ORIGINAL

Supreme Court, U.S.
FILE
AUG 28
CLERK

No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner,*

v.

WILEY DAVIS, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S MOTION
TO PROCEED IN FORMA PAUPERIS

Respondent Wiley Davis, Jr., respectfully requests leave to proceed *in forma pauperis.* Respondent was declared indigent by the United States District Court for the Northern District of Ohio and the Sixth Circuit. Under 18 U.S.C. §3006A and 21 U.S.C. §848, the District Court and the Sixth Circuit appointed undersigned counsel to represent Respondent.

Respectfully Submitted,

LAURENCE E. KOMP*
Attorney at Law
423 Madrina Ct.
Ballwin, MO 63021
(636) 207-7330
(fax)(636) 207-7351
**Counsel of Record*

RECEIVED
SEP 3 - 2003
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOHN P. PARKER
Attorney at Law
4403 St. Clair Ave.
Cleveland, OH 44103
(216) 881 – 0900
(fax)(216) 881 – 3928

COUNSEL FOR RESPONDENT,
WILEY DAVIS, JR.

No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner,*

v.

WILEY DAVIS, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAURENCE E. KOMP*
Attorney at Law
423 Madrina Ct.
Ballwin, MO 63021
(636) 207-7330
(fax)(636) 207-7351
**Counsel of Record*

JOHN P. PARKER
Attorney at Law
4403 St. Clair Ave.
Cleveland, OH 44103
(216) 881 – 0900
(fax)(216) 881 – 3928

COUNSEL FOR RESPONDENT,
WILEY DAVIS, JR.

CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Court of Appeals' application of Boyde v. California, 494 U.S. 370 (1990), to the unique instructions and verdict forms given to Respondent's jury in determining whether the instructions and verdict forms violated this Court's established Mills v. Maryland, 486 U.S. 367 (1988) decision which issued four years before Respondent's trial?

2. Should this Court should grant certiorari where the questions presented relate neither to the legal basis of the opinion below nor to any issue raised by Respondent?

3. Should this Court grant a petition for writ of certiorari relying on, at best, an intra-circuit conflict that relates to a determination of the unique aspects of the jury instructions and verdict forms as given to Respondent's jury?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED.....6

I. THE QUESTIONS PRESENTED CONTAIN MISSTATEMENTS AND MISCHARACTERIZATIONS OF THE RECORD.....6

II. THIS COURT DOES NOT NEED TO REVIEW TH ELOWER COURTS' APPLICATION OF SETTLED LEGAL PRINCIPLES TO THE UNIQUE INSTRUCTION AND VERDICT FORMS PROVIDED RESPONDENT'S JURY.....8

III. THE MILLS RULING IS CORRECT.....10

IV. THERE IS NO INERCIRCUIT OR INTRACIRCUIT CONFLICT.....12

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

Boyde v. California, 494 U.S. 370 (1990) .....passim

Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001).....13

Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003).....passim

Davis v. Mitchell, 2003 U.S. App. LEXIS 8417 (6th Cir. 2003).....1

Davis v. United States, 417 U.S. 333 (1974).....14

Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997).....9

Henderson v. Collins, 262 F.3d 615 (6th Cir. 2001).....13

Jones v. United States, 527 U.S. 373 (1999) .....passim

McCoy v. North Carolina, 494 U.S. 433 (1990).....passim

Mills v. Maryland, 486 U.S. 367 (1988).....passim

Roe v. Baker, 316 F.3d 557 (6th Cir. 2002).....13

Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000).....12,13

State v. Davis, 76 Ohio St.3d 107 (1996).....2

State v. Henderson, 39 Ohio St.3d 24 (1988).....3

Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527 (2003).....9

Zettlemoyer v. Fulcomer, 923 F.3d 284 (3rd Cir. 1991).....9

Kyles v. Whitley, 514 U.S. 419 (1995).....9

Rules

U.S.S.Ct.R. 10.....9, 11, 12

No. 03-151

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner,*

v.

WILEY DAVIS, JR., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wiley Davis, Jr., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Sixth Circuit's opinion in this case. The Sixth Circuit's opinion is reported as Davis v. Mitchell, 318 F.3d 682 (6th Cir. 2003). The Sixth Circuit denied *en banc* review finding that rehearing was unwarranted. Indeed, no judge of the *en banc* court found Petitioner's *en banc* petition worthy of a vote. Davis v. Mitchell, 2003 U.S. App. LEXIS 8417 (6th Cir. 2003), Apx. 31a-32a (noting "no judge of this court having requested a vote on the suggestion for rehearing en banc . . . .").[1]

STATEMENT OF THE CASE

Petitioner showed an unusual callousness as to the true basis of the charges and convictions Respondent has faced. Petitioner incorrectly alleges in the very first line of

---

[1] Due to it's ruling, the Sixth Circuit pretermitted the consideration of three other issues upon which a certificate of appealability was granted. Apx. 17a.

her statement of the case that Respondent "brutally raped" Amy Perkins. Petition p. 7. This is simple wrong. In truth, while Respondent was initially charged with rape (the fifth count of a six count indictment), the State of Ohio dismissed the rape count prior to Respondent's trial. Return of Writ Apx. p. 748.

While the jury did find Respondent guilty of an attempted rape death penalty specification, notably absent from and contrary to Petitioner's Statement of the Case, the Ohio Supreme Court *reversed* the conviction for the attempted rape specification because the attempted rape was not supported by sufficient evidence. State v. Davis, 76 Ohio St.3d 107 (1996), Apx. 83a ("Based on the evidence presented, we find there was insufficient evidence to prove beyond a reasonable doubt that Davis attempted to rape Perkins."). Therefore, it is simply a gross mischaracterization of the record to assert Respondent "brutally raped".

Further, Petitioner's statement of the case creates confusion as to when the constitutionally deficient instructions and verdict forms were given to Respondent's jury and also incorrectly describes Ohio death penalty procedures. Petitioner partially provides the instructions found by the Court of Appeals to be unconstitutional. Petition pp. 7-8. Thereafter, Petitioner notes "[a]fter deliberating, the jury convicted Davis of all counts listed in the indictment and recommended death sentences for the two aggravated murder counts." Petition pp. 8-9. This incorrectly describes the chronology of Respondent's case as well as Ohio death penalty procedures.

First, the jury had already convicted Respondent of some of the crimes charged and the death penalty specifications *prior to* hearing the flawed instructions and receiving

the flawed verdict forms. Contrary to Petitioner's statement, the determination of sentence was subsequent to, not at the same time, as a determination of guilt.

Second, Ohio provides a bifurcated system. An initial culpability phase occurs, which may or may not lead to a subsequent penalty phase. The jury determines guilt of the underlying crimes as well as the specifications at the culpability phase. The jury's finding as to guilt of the specifications serves two purposes in Ohio, as described by the Ohio Supreme Court, it provides the required narrowing function under Furman and its progeny, and determines death eligibility. State v. Henderson, 39 Ohio St.3d 24 (1988) (guilt finding as to specs performs the narrowing/eligibility function).

If a jury finds a defendant guilty of aggravated murder and a death specification, only thereafter does a defendant become death eligible. At which point, the penalty phase commences. An Ohio jury must decide and answer two questions at the penalty phase. First, the individual jurors must determine whether any mitigating factors exist. Second, the jury weighs the aggravating circumstances against the mitigation, and then determines which sentence to recommend. Both of these decisions were constitutionally corrupted by the unique instructions and verdict forms given to Respondent's jury.

Simply, the Sixth Circuit considered the unique instructions and verdict forms given to Respondent's jury. In so doing, the court identified the correct standard from this Court. Davis, 318 F.3d at 688, Apx. 12a, citing Jones v. United States, 527 U.S. 373 (1999) and Boyde v. California, 494 U.S. 370 (1990) ("whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the constitution").

The court acknowledged the unique instructions and verdict forms under consideration. Respondent's jury had just been instructed as to the two decisions they were required to make: the preliminary question as to existence of mitigation and the ultimate decision as to the weighing of aggravation versus mitigation. Immediately, thereafter the jury was instructed "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." Davis, at 689-90, Apx. 14a. This significant language, as well as the requirement of twelve signatures signifying acquittal of death before a life verdict could even be considered (Id.), which lead the court to conclude "the inescapable likelihood in this case is that the jury under stood the instructions to require unanimity in both its ultimate and interim conclusions violates Mills." Davis, at 90, Apx. 15a . The court thus granted relief on the ground that Respondent was denied his rights at the penalty phase of the trial, as guaranteed by Mills v. Maryland, 486 U.S. 367 (1988) and McCoy v. North Carolina, 494 U.S. 433 (1990).

Petitioner wholly mischaracterizes the basis of the court's opinion. Petitioner contends that the court granted relief solely on the basis that Respondent's jury was not instructed as to what occurs if they are deadlocked. Petitioner contends this creates conflict with Jones, 527 U.S. 373,[2] and a host of Circuit authority that has applied Jones. Like Petitioner's misleading assertions as to the "brutal rape," this is yet again a clear misstatement of the ruling of the court of appeals.

Indeed, the Panel did not find constitutional error due to a failure to instruct as to the consequences for a potential failure to agree. The Panel applied Boyde and found error because the instructions and verdict forms violated Mills by requiring juror

[2] In Jones, this Court rejected the proposition that jurors must be instructed as to the consequences of their failure to agree.

unanimity as to the existence of mitigation and requiring an "acquittal first" or other before the jury could give effect to mitigating evidence and consider a life sentence. Davis, 318 F.3d at 689-71, App. 14a-17a. Petitioner attempts to manufacture a Jones conflict, however, the opinion rebuts any such suggestion:

> Given the requirement of unanimity as to the jury's ultimate recommendation of either death or life under Ohio law, it is not surprising that the unarticulated but constitutionally required non-unanimous mechanism that will prevent a recommendation of death is obscured to such an extent that it cannot even be said to be implied by the instructions in this case. Instead of instructing the jury that it need not be unanimous in rejecting the death penalty, the trial judge in this case told the jury that in order to return a verdict for life imprisonment, "you must find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors." Immediately thereafter, the Court instructed that "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." The verdict form likewise reflected a unanimity requirement in finding that the aggravating circumstances do not out weigh the mitigating circumstances....

Davis, at 689, App. 14a. The court did not fault the trial court for failing to instruct on what occurs upon jury deadlock, but faulted the state court for "obscuring" the juror's ability to consider and give effect to mitigation without the unanimous approval of all jurors. Id. Thus, the court concluded Respondent's acquittal first instructions present "an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." Id.

The court's decision does not implicate Jones. Rather, it reinforces what this Court has consistently maintained: life should be on equal footing with death via the unfettered ability to consider and give effect to mitigation by each juror.

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. THE QUESTIONS PRESENTED CONTAIN MISSTATEMENTS AND MISCHARACTERIZATIONS OF THE RECORD

As an initial matter, the questions presented by Petitioner are misleading and contain critical mischaracterizations of the legal issues considered by the Sixth Circuit. The three questions presented by Petitioner concern whether the Sixth Circuit failed to follow the clearly established authority of this Court in that the Sixth Circuit found error due to the failure to instruct the jury that they need not be unanimous. Petition, unnumbered.

This simply is not true. First, Respondent never alleged below that the failure to give instructions engendered constitutional error. Rather, Respondent argued that the instructions and verdict forms unique to his case violated Mills. The fact Respondent never argued the absence of instructions constituted error is borne out by Petitioner's Final Brief below, where Jones v. United States is not even cited.

Second and presumably because Respondent never raised such challenges, the Sixth Circuit did not decide the questions now presented by Petitioner. Rather, the Sixth Circuit found that a reasonable jury could have understood the instructions in Respondent's case as requiring unanimity as to the existence of mitigation and denied a jury the opportunity to give effect to the mitigation until unanimously rejecting death. Davis, 318 F.3d at 689-92, App. 14a-17a. Thus violating Mills. Id.

The Sixth Circuit's opinion merely applied this Court's authority to the series of verdict forms and jury instructions given to Respondent's jury. In so doing, the Sixth Circuit identified and applied the required and correct Supreme Court test from Boyde, 494 U.S. 370. See Davis, 318 F.3d at 688, App. 12a ("whether there is a reasonable

likelihood that the jury has applied the challenged instruction in a way that violates the constitution") (citations omitted). Applying Boyde, the Panel concluded Respondent's jury received an improper "acquittal first" instruction and verdict forms, and the instructions required unanimity as to the existence of mitigating evidence before it could be weighed. Id. at 689-92, Apx. 14a-17a. Thus the Panel ruled these two instructional errors violated the Eighth Amendment as interpreted by this Court in Mills by requiring unanimity as to the preliminary question (existence of mitigation) and as to the ultimate sentencing question (no life option until all jurors acquit of death). Id.

In this regard, Petitioner attempts to manufacture her questions presented and thereby create a conflict with Jones, 527 U.S. 373. In her attempt to manufacture a conflict, Petitioner emphasizes and takes out of context a few sentences from the court's opinion. Petition p. 14.

As previously noted however, the court did not fault the trial court for failing to instruct on what occurs upon jury deadlock, but faulted the state court for "obscuring" the jury's ability to consider and give effect to mitigation without the unanimous approval of all jurors. Davis, at 689, Apx. 14a. Thus, the court concluded Respondent's acquittal first instructions present "an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty." Id.

Stated another way, the court did not reverse for failing to give the instruction, but merely noted that without such instruction and in the unique circumstances of Respondent's case, a reasonable jury would understand the instructions and verdict forms as denying the ability to give effect to mitigation unless and until, an acquittal of death.

In sum, in seeking certiorari, Petitioner has misstated and mischaracterized the legal basis of the court's opinion. Given this clear mischaracterization, Petitioner is thus asking this Court to review an issue that is not even presented by the judgment below. Because the questions posed by Petitioner are not presented in the record, the questions cannot be reviewed and the petition must be denied.

II. THIS COURT DOES NOT NEED TO REVIEW THE LOWER COURTS' APPLICATION OF SETTLED LEGAL PRINCIPLES TO THE UNIQUE INSTRUCTIONS AND VERDICT FORMS PROVIDED RESPONDENT'S JURY

The writ should also be denied because this case presents no compelling reason for review, as Petitioner merely requests that this Court review the Sixth Circuit's application of settled legal principles to the unique instructions and verdict forms provided to Petitioner's jury. Indeed, the court identified the governing legal standard, Boyde. Davis, 318 F.3d at 688, Apx. 12a. Applying, Boyde, the court examined whether the instructions in Respondent's case violated Mills. Davis, at 687-88, Apx. 10a-11a.

Indeed, Petitioner recognizes that Mills is the clearly established and applicable controlling authority. Petition p. 13 ("It is well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. See Mills, 486 U.S. at 374-375; McCoy, 494 U.S. at 435.").[3] Petitioner also does not dispute the content of the instructions. With the facts and the law to be applied not in dispute, and with the lower court simply having applied those facts to the applicable law, it is clear that the writ should be denied because this Court is not in the business of conducting third-tier reviews of the same application of law to undisputed facts.

[3] This recognition of Mills contradicts in large measure Petitioner's allegations that the basis of the court's ruling is not "clearly established."

Authority cited by Petitioner demonstrates the unique and fact-intensive manner of this inquiry. For instance, given the unique instructions in Zettlemoyer v. Fulcomer, 923 F.3d 284 (3rd Cir. 1991),[4] the habeas petitioner could not state a claim for relief under Mills. Thereafter, given the unique instructions in Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997), the habeas petitioner could state a claim for relief under Mills. A Mills error is not a "one size fits all error." It requires a reviewing court to apply the Boyde test to determine whether the instructions and verdict forms violate Mills. On a case-by-case basis, a reviewing court must faithfully apply Boyde to the instructions before it.[5] Thus, Boyde rebuts Petitioner's suggestion that Mills is a "one size fits all error;" rather, it reinforces that Petitioner simply disagrees with the court's result.

Petitioner, therefore, makes the unexceptional request that this Court grant certiorari to review properly stated, settled legal principles to the unique instructions and verdict forms of this case. Under such circumstances, certiorari is simply not warranted. See U.S.S.Ct.R. 10 (certiorari not warranted where lower court applied facts to properly stated rule of law); Kyles v. Whitley, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting).

---

[4] Petitioner alleges the instructions in Zettlemoyer are close to Respondent's case. This is not true. Zettlemoyer did not concern an instruction, as given Respondent's jury, that "since this is a criminal case the law requires that in order for you to reach a decision all 12 of you must be in agreement." Further, the state court in Zettlemoyer used "verdict" in its instructions. However, Respondent's jury was not instructed as to their "verdicts" but was instructed that any "decision," which would include whether mitigation existed, required the agreement of all 12 jurors (see Tr. 1885 lines 16-17, Apx. 103a; Tr. 1885 lines 20-25 – 1886 lines1-3, Apx. 104a.), *and* Respondent's jury received an acquittal first instruction. Tr. 1889 lines 13-18, Apx. 105a-106a. Applying Boyde, the Panel reasonably concluded that a reasonable jury would understand this combination of instructions to require all 12 jurors to agree as to the existence of mitigating evidence. Davis, at 689-692, Apx. 14a-17a. This demonstrates precisely why this issue is not amenable to cert. This Court is not a court of error and does not need to parse through and compare instructions in verdict forms from varying cases to determine if a federal court correctly resolved a claim.

[5] This makes a Mills claim similar to an ineffectiveness claim. In that, just because this Court found counsel ineffective in Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527(2003), will not necessarily lead to an exodus from death rows throughout the country. Wiggins simply reinforces the Strickland standard and a state court's obligation to faithfully apply such standard. It does not relieve any court, state or federal, of its obligation to apply the standard to each cases facts.

III. THE MILLS RULING IS CORRECT

While the petition should be denied because it seeks review of the lower courts' application of the law to the facts to unique instructions and verdict forms, the petition should also be denied because the judgment below is correct under Mills, 486 U.S. 367 and McCoy, 494 U.S. 433.

The trial court unequivocally stated that "you, the trial jury" was responsible for the decisions to be made during the penalty phase. Tr. 1888 line 1, Apx. 105a. "[Y]ou, the trial jury" must consider all evidence and determine whether the aggravating specifications found outweigh any mitigating factors "you find that are present in this case" Tr. 1888 line 11-12, Apx. 105a . This makes it absolutely clear that "you" is "the trial jury" not only as to this instruction, but as to all the penalty phase instructions as well. Consequently, the trial jury -- not individual jurors -- makes the two decisions (existence of mitigation and sentencing decision) at the penalty phase.

The jury was also instructed that "you are to decide whether it is a relevant factor of mitigation." Tr. 1885 lines 16-17, Apx. 103a. Immediately thereafter, this concept was reinforced "you will be called upon to decide the factual questions as to whether or not the defendant" has produced mitigation, that is "has the defendant met the burden of going forward with" mitigating evidence. Tr. 1885 lines 20-25 – 1886 lines1-3, Apx. 104a.

In short, the existence of mitigation therefore is a factual decision which "you, the jury" decide. In other words, a decision is made by all twelve jurors, not just one. This is later conclusively established when the court states "[n]ow, as you know, since this is a

criminal case the law requires that in order for you to reach a decision all twelve of you must be in agreement." Tr. 1892 lines18-21, Apx. 107a.

Further, the trial court improperly instructed Respondent's jurors that they could not give effect to the mitigation -- consider a life sentence -- until they had **first** acquitted, unanimously, Respondent of the potential death sentence. Tr. 1889 lines 13-18, Apx. 105a-106a. Until the unanimous acquittal on death, the jury could not **give effect to** any mitigating evidence.[6]

As a consequence of the above instructions, there is, at the very least, a reasonable likelihood that the jury would have understood that in making the factual findings of mitigation that they had to do so as a jury and unanimously. Further, the jury could not give effect to the mitigation – consider life options – until unanimously rejecting death. This violates the well-settled law that a State cannot require jurors during capital sentencing deliberations to consider only those mitigating factors that the jury unanimously finds are present. See Mills, 486 U.S. at 374-375; McCoy, 494 U.S. at 435.

Thus, the Sixth Circuit rightly concluded that the instructions would cause a reasonable jury to impose a unanimity requirement as to the existence of mitigation. Nothing about the panel's analysis is either incorrect or exceptional. The panel's conclusion in applying settled principles to the unique instructions and verdict forms herein was correct. Certiorari should be denied. See also U.S.S.Ct.R. 10.

---

[6] This erroneous instruction mirrored comments made by the trial court to the prospective jurors during group voir dire. Specifically, the trial court informed the prospective jury panel, including all twelve of Respondent's jurors, that "[o]n the other hand, if you find that the aggravating circumstances do not outweigh the factors in mitigation beyond a reasonable doubt then you would be given the opportunity to impose a sentence of life imprisonment." Tr. 466, Circuit Jt. Apx. 126 (emphasis added).

IV. THERE IS NO INTERCIRCUIT OR INTRACIRCUIT CONFLICT

The writ should also be denied because, contrary to Petitioner's assertions, there is no conflict between the judgment below and the decision of any other federal court of appeals. See U.S.S.Ct.R. 10(a). Petitioner cites various cases to claim that the judgment below conflicts with judgments of other lower courts. All of the cases cited as supporting a purported conflict rely on the manufactured Jones conflict.

There is absolutely no conflict with Jones because the court below did not find constitutional error for the failure to instruct. Consequently, this Court must deny Petitioner's certiorari request.

Petitioner also claims that the Sixth Circuit's application of the law to the facts here is in conflict with other Sixth Circuit authority considering varying instructions. See Petition p. 21. Contrary to Petitioner's assertions, there simply is no conflict between the Court of Appeals' judgment and its prior judgments.

The court's decision is fully reconcilabe with the other circuit authority. For example, Scott v. Mitchell, 209 F.3d 854, 875 (6th Cir. 2000) ("this instruction plainly applies to the overall weighing of mitigating and aggravating factors"), noted that the instructions were not "acquittal first" instructions, but "consider first" instructions.[7] Indeed, the Sixth Circuit consistently recognizes "acquittal first" instructions are

---

[7] The instructions given to Scott are not identical to those given Respondent's jury as noted by the court below:

> **that is, you must find that the state has failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant was found guilty of committing outweigh the mitigating factors.**
> In this event you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

Davis, at 685, Apx. 5a (bold not given in Scott). Respondent's verdict forms, unlike Scott's, required the jury to make a unanimous finding acquitting of death before considering the life options. Davis, at 689-690, Apx. 14a-16a. Finally, Scott did not address any of the instructions Respondent presented to this Court in his third basis for not granting the writ. See pp. 10-11. This again underscores the factual uniqueness of Respondent's case.

constitutionally deficient under the Eighth Amendment. See Henderson v. Collins, 262 F.3d 615, 622 (6th Cir. 2001) ("reversal of a capital sentence is warranted"); Buell v. Mitchell, 274 F.3d 337, 355-56, n. 8 (6th Cir. 2001); Roe v. Baker, 316 F.3d 557 (6th Cir. 2002).

As found by the court, Respondent's jury was instructed "Death, but if you unanimously reject death, only then can you consider 30 to life or 20 to life." This is a far cry from the instructions in the other claimed conflict cases: "start with considering death, but also consider 30 to life or 20 to life." That being said the Petitioner's merit brief below correctly noted and **conceded** that there is no principle distinction between the "acquittal first" error and a violation of Mills. Petitioner's Sixth Circuit Final Brief pp. 25-26.

Finally, it should be noted that the named Petitioner herein has recognized this distinction. In McNeill v. Mitchell, Case No. 1:02 CV 1645 (N.D. Ohio) (Wells, J.)(pending), Petitioner noted the differences between "consider first" and "acquittal first" instructions. EFP Docket No. 40 at p. 109. This contradicts Petitioner's allegation herein.

This eviscerates Petitioner's suggestion of an intracircuit conflict. Again, a Mills error is not a "one size fits all error." A reviewing court must faithfully apply Boyde on a case-by-case basis to the instructions before it. Boyde denounces Petitioner's belief that there can never be a Mills violation in Ohio because the Sixth Circuit Court ruled in Scott that there was no Mills violation. Likewise, just because Respondent's unique instructions satisfied Mills will not lead to an exodus from Ohio's death row.

Even if an intracircuit conflict exists, which Respondent asserts one does not exist, this Court's certiorari jurisdiction is not properly invoked to resolve an intracircuit conflict, See Davis v. United States, 417 U.S. 333, 340 (1974), much a less an intra-circuit conflict which the lower court's members found so lacking in merit as no member of the court requested a vote. Therefore, the Court must deny the cert request.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LAURENCE E. KOMP*
Attorney at Law
423 Madrina Ct.
Ballwin, MO 63021
(636) 207-7330
(fax)(636) 207-7351
**Counsel of Record*

JOHN P. PARKER
Attorney at Law
4403 St. Clair Ave.
Cleveland, OH 44103
(216) 881 – 0900
(fax)(216) 881 – 3928

COUNSEL FOR RESPONDENT,
WILEY DAVIS, JR.